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IN THE

Supreme Court of the United States

October Term, 1983

No. 83-812

GEORGE C. WALLACE, Governor, et al.,

Appellants,

v.

ISHMAEL JAFFREE, et al.,

Appellees.

No. 83-929

DOUGLAS T. SMITH, et al.,

Appellants,

v.

ISHMAEL JAFFREE, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE FREEDOM COUNCIL, AMICUS CURIAE, IN SUPPORT OF THE APPELLANTS

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BRIEF OF THE FREEDOM COUNCIL, AMICUS CURIAE, IN SUPPORT OF THE APPELLANTS

INTEREST OF AMICUS CURIAE[1]

This case presents important issues concerning the power of the state to recognize and accommodate America's religious pluralism and diversity in the operation of the public

[1] Counsel of record to the parties in the cases described above have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

schools without infringing upon the freedom of conscience of individual students or teachers. The Freedom Council is greatly concerned about the implications for religious freedom and tolerance raised by the Court of Appeals' decision in this case. The Freedom Council believes that the Court of Appeals ruling swept too broadly when it invalidated the Alabama meditation or silent prayer statute. The statute does not advance religion. It merely provides for a period of silence that recognizes in neutral fashion the freedom of conscience of each teacher and student. Teachers are free to decide whether or not to observe a period of silence and students are free to utilize the period of silence in the manner they individually choose. Such activity merely advances the spirit of pluralism and toleration intended by the First Amendment and does not constitute an unlawful establishment of religion.

The Freedom Council is a non-profit religious corporation organized to defend, restore, and preserve religious liberties guaranteed by the Constitution. With chapters in each of the 50 states, the Freedom Council is also affiliated with student groups on over 70 college campuses and with the Christian Broadcasting Network, currently the largest cable television network in the United States reaching over 20 million homes. The Freedom Council assists its chapters and associated organizations in addressing issues on the local, state and national levels that have a significant impact on First Amendment religious freedoms.

Amicus Curiae is represented by participating attorneys from The Rutherford Institute, a non-profit religious corporation named for Samuel Rutherford, a 17th-century Scottish minister and Rector at St. Andrew's University. Through the efforts of its staff and affiliated local chapters, attorneys and lay persons, the Institute undertakes to assist

litigants and to participate in significant cases relating to First Amendment religious freedoms. Counsel for *Amicus Curiae* have specialized in constitutional litigation, including the Religion Clauses of the First Amendment, and have participated as counsel for *amici curiae* in previous cases before this Court. Counsel John W. Whitehead has argued and served as special constitutional consultant in numerous First Amendment cases and has authored several books and law review articles that focus on interpretation and application of the First Amendment Religion Clauses. The Freedom Council believes the expertise of its counsel will be of assistance to the Court in this case.

SUMMARY OF ARGUMENT

In prior cases, this Court has relied upon the intent of the Framers of the Bill of Rights for understanding the meaning and reach of the Establishment Clause. The historical record shows that the climate of the revolutionary period was fundamentally religious and favored government accommodation of religious practices, some of far more significance than the Alabama law in question. Both Jefferson and Madison, often cited for their disestablishmentarian views, in fact tolerated and approved numerous religious practices in the public schools and in public life. Jefferson, for example, was President of the School Board of the District of Columbia where the Bible and the Watts Hymnals were used as primary texts. Moreover, our national history is replete with examples of government, in a spirit of toleration and accommodation, recognizing, as the State of Alabama has in this case, America's religious tradition and culture, but without infringing on the rights of conscience of those who do not subscribe to particular tenets of that tradition or culture.

The Alabama law in question is permissive. It provides an opportunity to observe a period of silence in which each may meditate or voluntarily pray. It respects the inviolability of conscience that is at the heart of the Free Exercise Clause. It is not a constitutionally proscribed establishment of religion. It merely advances in neutral fashion the freedom to believe (or not to believe) and constitutes the type of affirmative, yet neutral, accommodation mandated by the First Amendment.

The Alabama law also satisfies the "tri-partite test" of *Lemon* v. *Kurtzman*, 405 U.S. 602 (1971). Secular means and ends are furthered by the period of silence, including the interests of calling the classroom to order, instructing the students in self-discipline, teaching the students respect for the authority of the teacher, permitting students to contemplate serious thoughts and values, engendering an appreciation for this nation's cultural and religious heritage and promoting religious liberty and tolerance through voluntarism. Any nominal aid to religion is incidental to the purposes of the statute and *de minimus* when compared to statutory enactments this Court has approved in the past.

ARGUMENT

I.

Alabama's Statutory Provision Which Permits Public School Teachers To Begin The School Day With Meditation Or Silent Prayer Does Not Conflict With The Intentions Of The Framers Of The First Amendment As Revealed In Their Words, Deeds, And History.

History provides varied and ample evidence that among the founders of this Republic and its early presidents and congresses, the universal sentiment towards religion was one of accommodation, not merely toleration. It is *unequivo-*

cably clear from the language, intent, and history surrounding the adoption of the First Amendment that the separation of church and state intended by the Bill of Rights was of limited effect and that amicability, not hostility to the free exercise of religion, was the *shibboleth* of that era.

In Religion Clause adjudication, no less than any other area of law, Justice Holmes' statement is most fitting: "A page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921). The determination of "the ultimate constitutional objective" as expressed by the Framers and *"as illuminated by history"* is of particular relevance here. *Lynch* v. *Donnelly*, ___U.S. ___, ___, 104 S.Ct. 1355, 1361 (1984); *Walz* v. *Tax Commission*, 397 U.S. 664, 671 (1970). In this regard, this Court has said:

> In applying the First Amendment to the states through the 14th Amendment, *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), it would be incongruous to interpret that clause as imposing more stringent First Amendment limits on the states than the draftsmen imposed upon the Federal Government.

Marsh v. *Chambers*, ___ U.S. ___, ___, 103 S.Ct. 3330, 3335 (1983). Because of this basic constitutional presupposition, concrete, specific historical evidence of the Framers' views on religion and religious practices in public life must be placed at a premium to understand the reach and meaning of the First Amendment Religion Clauses.

A. The Views Of Thomas Jefferson And James Madison.

The views of Thomas Jefferson and James Madison have been previously recognized by this Court as most instructive. *Everson* v. *Board of Education*, 330 U.S. 1 (1947). Al-

though Thomas Jefferson can in no sense be regarded as a Framer of the First Amendment, this Court, in its early Religion Clause cases, has adopted the view that "the framers spoke in a wholly Jeffersonian dialect and those who ratified it fully understood that style of speech." M. Howe, *The Garden and the Wilderness* 10 (1965).[1] At the time of the drafting and adoption of the First Amendment, Jefferson was in France. However, through his correspondence with James Madison, his influence was at least partially felt.

In many ways, the views of Madison and Jefferson were *not* representative of those of the Framers of the Constitution. Both Madison and Jefferson were from Virginia and were central figures in the fight in that state for the disestablishment of the Church of England. *See Everson* v. *Board of Education,* 330 U.S. at 11-13 and 33-42 and *Engel* v. *Vitale,* 370 U.S. 421, 428-429 (1962)[2]

Not all states, however, shared Madison's and Jefferson's fervor for disestablishment. As this Court has previously noted, at the outbreak of the Revolutionary War, "there

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[1] Antieau, Downey and Roberts note, however, that: "[T]he First Amendment was hardly the exclusive product of any one person. Subsequent interpretations of the Amendment should not be controlled by the singular statements of Madison [or] Jefferson. . . . An examination of the early activities of the Federal Government indicates that the people approved and welcomed its aid to church related activities. . . . There was undoubtedly the faith that subsequent generations of Americans would be able to utilize the power of the Federal Government to promote the concurrent interests of government and religion under First Amendment norms that were reasonable, pragmatic, and just." C. Antieau, A. Downey and E. Roberts, *Freedom From Federal Establishment* 207-209 (1964).

[2] Both Madison's *Memorial and Remonstrance Against Religious Assessments,* written in 1785 in opposition to legislation which would use Virginia's public funds to pay teachers of the Christian religion, and Jefferson's *Bill for Establishing Religious Freedom* in Virginia, proposed in 1779 and enacted in 1786, were central documents to these disestablishmentarian forces.

were established churches in at least eight of the thirteen former colonies and established religions in at least four of the other five." *Engel* v. *Vitale,* 370 U.S. at 428. The disestablishment of state churches was by no means complete by the time of the ratification of the Federal Constitution. Indeed, the Congregational Church was not disestablished in Connecticut until 1818 and in New Hampshire until 1819. The last of the colonies, Massachusetts, was not disestablished until 1833. P. Stokes and L. Pfeffer, *Church and State in the United States* 77-78 (1964).

This history of state church establishment illustrates that the term "establishment" had a fixed meaning in the minds of the drafters. On the Federal level, "[t]he real object of the [first] amendment was. . . to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government." *Lynch* v. *Donnelly,* 104 S.Ct. at 1361, *citing* 2 J. Story, *Commentaries on the Constitution of the United States* 593-595 (2d ed., 1851). This restriction was *institutional* in nature. As Jefferson's often quoted expression stated, the Religion Clauses were to build "a wall of separation between *Church* and *State.*" 8 *Works of Thomas Jefferson* 113 (Washington ed. 1861) (emphasis supplied). No wall of separation was intended, however, even by Jefferson, to seal religion hermetically from governmental activities. The *institution* of the church was to be isolated from the *institution* of the state. As Jefferson stated in 1817:

> If by *religion,* we are to understand *sectarian dogmas,* in which no two of them agree, then your exclamation on that hypothesis is just, "that this would be the best of all possible worlds, if there were no religion in it." But if the moral precepts, innate in man, and made a part of his physical constitution, as necessary for a social being . . . in which all agree, constitute true re-

> ligion, then, without it, this would be, as you again say, "something not fit to be named even, indeed, a Hell."

15 *The Writings of Thomas Jefferson* 109 (Memorial ed. 1904). Indeed, it must be noted: "Probably, at the time of the adoption of the constitution, and of the amendment to it now under consideration, the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship." J. Story, *supra; see also* H. Black, *Constitutional Law* 515 (4th ed., 1927) and T. Cooley, *Principles of Constitutional Law* 224 (1893).

That this sort of accommodation of religious freedom was compatible with the alleged "separationist" views of Thomas Jefferson was particularly evident in Jefferson's actions in the field of education. Jefferson as President repeatedly departed from the fastidious separationism which revisionist historians have attributed to him. For example, on three separate occasions, Jefferson signed into law extensions of a land grant given by the Federal government specifically to promote proselytizing amongst the Indians. R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 41-46 (1982).[3] Further, in 1803, President Jefferson proposed to the United States Senate a treaty with the Kaskaskia Indians in which the Federal government would agree to "give annually for seven years one hundred dollars

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[3] *An act regulating the grants of land appropriated for military services, and for the society of the United Brethren for propagating the gospel among the heathen, and for other purposes,* as extended by: *An Act in addition to an act, intituled etc.,* Ch. 30, 2 Stat. 155-156 (Peters ed. 1845); *An Act to revive and continue in force, etc., and for other purposes,* Ch. 30, 2 Stat. 236-237 (Peters ed. 1845); and *An Act granting further time for locating military land warrants, and for other purposes,* Ch. 26, 2 Stat. 271-272 (Peters ed. 1845).

towards the support of a priest" and "further give the sum of three dollars to assist the said tribe in the erection of a church." *A Treaty Between the United States of America and the Kaskaskia Tribe of Indians,* 7 Stat. 78-79 (Peters ed. 1846). The treaty was ratified on December 23, 1803, and included a specific appropriation for a Catholic mission, *at President Jefferson's request.*

Jefferson's involvement in the accommodation of the religious nature of the American people was not limited to Federal grants for the proselytizing of Indians. It extended as well to general public education. Jefferson was the first president of the school board in the District of Columbia in which the Bible and the Watts Hymnal were used as the primary texts. J. Wilson, *Public Schools of Washington,* 1 Records of the Columbia Historical Society 4 (1897). Mr. Jefferson also advocated religious instruction at the University of Virginia, of which he was a founder. Although the University was wholly governed, managed and controlled by the Commonwealth of Virginia, Jefferson believed that religious instruction on the school's premises was "most interesting and important to every human being...The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in the general institution of the useful sciences." *McCollum* v. *Board of Education,* 333 U.S. 203, 245-246 (1948) (Reed, J., dissenting), *citing* 19 *The Writings of Thomas Jefferson* 414-417 (Memorial ed., 1904). Clearly, Jeffersonian state disestablishment did not require the eradication of religion from public schools, even though Virginia's *Bill for Establishing Religious Freedom* may have had much more stringent provisions than those constraining the Federal government.

James Madison, although often cited as antagonistic toward religion, participated in the creation of several

government sponsored religious practices.[4] Madison is repeatedly noted for leading the disestablishment forces against Patrick Henry's *A Bill Establishing a Provision for Teachers of the Christian Religion,* which would have provided a subsidy to religion. It is apparent, however, that Madison's *Memorial and Remonstrance Against Religious Assessments* was specifically pointed at discriminatory aid along sectarian lines. In fact, Madison seemed especially opposed to inequal treatment caused by discrimination along denominational lines. R. Cord, *supra,* at 20-21.

Later acts by Madison further clarify that he was not opposed to governmental benevolence towards religion generally. A primary example of Madison accommodating the religious needs of the American people occurred three days before final agreement upon the wording of the Bill of Rights. Madison, a participant in the first House of Representatives, was a member of the congressional committee that recommended the chaplain system. H. R. Rep. No. 124, 33rd Cong., 1st Sess. (1789), *reprinted in* 2 *Reports of Committees of the House of Representatives* 4 (1854). Madison himself voted for the bill authorizing payment of chaplains for their services. 1 *Annals of Cong.* 891 (J. Gales ed. 1834) and *Marsh* v. *Chambers,* 103 St. Ct. at 3333. Reverend William Linn was elected as chaplain to the House of Representatives and five hundred dollars was appropriated from the Federal treasury to pay his salary.

On September 25, 1789, the same day that final agreement was reached upon the wording of the Bill of Rights,

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[4] It is interesting to note that in the same year that Madison and Jefferson's collaborative efforts resulted in the passage of *A Bill for Establishing Religious Freedom,* Madison presented to the Virginia legislature *A Bill for Punishing . . . Sabbath Breakers,* which imposed a fine of "ten shillings for every such offence." *McGowan* v. *Maryland,* 366 U.S. 420, 438-439 (1960).

the House resolved to request that President Washington proclaim a Day of Thanksgiving to acknowledge "the many signal favors of Almighty God." *Journal of the House of Representatives* 123; *Journal of the Senate* 88; *Marsh* v. *Chambers*, 103 S.Ct., at 3334. James Madison endorsed this and other proclamations calling for Thanksgiving, fasting and prayer. R. Cord, *supra*, at 28-29. Indeed, later, as President, Madison issued at least four "Thanksgiving Day" executive proclamations. Those occurred on July 9, 1812, July 23, 1813, November 16, 1814 and March 4, 1815. *Id.* at 31.

These actions of Madison and Jefferson are of particular interest because they are contemporaneous with, and proximate to, the drafting of the First Amendment. As this Court has held, "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied . . . —— their actions reveal their intent." *Marsh* v. *Chambers*, 103 S.Ct. at 3344.

If James Madison and Thomas Jefferson are an anomaly, it is because of their fervor for disestablishment. Yet, the evidence is clear that both Virginians advocated, participated and authorized *Federal government funding* and sponsorship of patently religious activities which generally exceeded that degree of accommodation fostered by the Alabama law involved in the present case.

B. Executive And Congressional Actions In Support Of Our Religious Heritage.

Other manifestations of governmental benevolence towards religion of a greater magnitude than the Alabama law are manifest. Universally, the oath of office for Presidents has been administered upon the Bible. By resolution

adopted by both houses of Congress it was decided that "divine services" should be held in St. Paul's Chapel in the District of Columbia to be "performed by the Chaplain of Congress" following the administration of the oath of office to George Washington in 1789. P. Stokes and L. Pfeffer, *supra,* at 87. On April 30, 1789, Washington upon assuming office stated, "...it would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe..." *Engel* v. *Vitale,* 370 U.S. at 446 (Stewart, J., dissenting).

Each of our Presidents, from George Washington to the present Chief Executive has, upon assuming his office, asked the protection and help of God. An impressive grouping of such invocations appears in *Engel* v. *Vitale,* 370 U.S. at 446-449. As previously mentioned Presidents Washington, Adams, and Madison issued, at the request of Congress, Presidential Thanksgiving proclamations. Such executive expressions can not be cavalierly relegated to the archaic past, but must be recognized as part of our rich inheritance of "countless...illustrations of the Government's acknowledgement of our religious heritage and governmental sponsorship of graphic manifestations of that heritage." *Lynch* v. *Donnelly,* 104 S.Ct. at 1361.

Of course, such accommodations to the spiritual needs of the American people are not limited to the Executive Branch. Congress, besides being integrally involved in the adoption of legislative prayer and paid Congressional Chaplains, initiated the proclamations already discussed. Perhaps more important the Continental Congress enacted the Northwest Ordinance on July 13, 1787. That ordinance, in part, provided:

> Religion, morality, and knowledge being essential to good government and the happiness of mankind,

schools and the means of education shall forever be encouraged.[5]

Ord. of 1787, July 13, 1787, Art. 3, reprinted in *Documents Illustrative of the Formation of the Union of American States* 52 (1927). On August 7, 1789 (after the agreement to the final wording of the Bill of Rights), the Congress of the newly formed Federal government reenacted the Northwest Ordinance. *An Act to provide for the Government of the Territory Northwest of the river Ohio* (Northwest Ordinance), Ch. 8, 1 Stat. 50-51 (Peters ed. 1845).

This Federal grant of land for the promotion of "religion, morality, and knowledge" was not a unique occurrence among the early settlers. For example, in 1795, President Washington concluded a treaty with the Oneida, Tuscorora and Stockbridge Indians in which the United States paid "one thousand dollars, to be applied in building a convenient church at Oneida," to replace the one which the British burned in the Revolutionary War. *A Treaty Between the United States and the Oneida, Tuscorora, and Stockbridge Indians, dwelling in the Country of the Oneidas,* 7 Stat. 47-48 (Peters ed. 1846). Later in 1819 in a treaty with the Wyandot Indians, Article I of the treaty granted six hundred and forty acres to the rector of the Catholic Church of St. Anne in Detroit. *Articles of a (Wyandot Indian) Treaty,* 7 Stat. 160, 166 (Peters ed. 1846). In 1825, President John Quincy Adams provided in a treaty with the Osage Indians for a "Missionary establishment" to teach, civilize and im-

[5] A. Stokes and L. Pfeffer comment on one manifestation of such encouragement: "Also worthy of mention in this listing of the official acts and utterances of the founders before the Constitution are the resolution of Congress in 1777 instructing the Committee on Commerce to import twenty thousand copies of the Bible and its resolution of 1782 approving 'the pious and laudable undertaking' of a printer named Robert Aitken in publishing an American edition of the Holy Scriptures." A. Stokes and L. Pfeffer, *supra,* at 85.

prove the indians. *Articles of a (Osage Indian) Treaty,* 7 Stat. 242-43 (Peters ed. 1846). As late at 1833, we find the Federal government obligated to pay "thirty seven hundred dollars, for the erection of a mill and church" as terms of a treaty with the Kickapoo Indians. *Articles of a (Kickapoo Indian) Treaty,* 7 Stat. 391-392 (Peters ed. 1846).

Besides these treaties with the individual Indian tribes, Federal money was expended to support religious schools and training —— a policy of "civilizing the Indians." This policy was implemented almost exclusively by religious societies, fulfilling the Federal government's "duty to use . . . [its] influence in converting to Christianity and bringing within the pale of civilization" the Indian tribes. 2 J. Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789-1897* 415-416 (1901) (Address by President John Quincy Adams in his Fourth Annual Message to Congress on December 2, 1828). The list of tribes and Missionary societies supported from Federal funds is quite extensive. 2 *American State Papers* 275-277 (J. Gales ed. 1834). Direct subsidies were given from the Federal treasury to the following religious societies: the United Brethren, the American Board of Commissioners for Foreign Missions, the Baptist General Convention, the Protestant Episcopal Church of New York, the Hamilton Baptist Missionary Society, the Methodist Society, the Synod of South Carolina and Georgia, the Society of Jesuits, the Cumberland Missionary Board, and the Society for Propagating the Gospel. 1 *U.S. Office of Indian Affairs, Annual Reports of the Commissioner of Indian Affairs, 1824-1831* (1976) (Report of November 24, 1827).

These treaties and grants are of particular relevance since, as this Court has noted "the interpretation of the Establishment Clauses by Congress in 1789 takes on special signifi-

cance in light of the Court's emphasis that the First Congress 'was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument.' " *Meyers* v. *United States,* 272 U.S. 52, 174-175 (1926); *Lynch* v. *Donnelly,* 104 S.Ct. at 1359.

Congressional actions seeking to embody the religious nature of the American people are not limited to the early years of our Republic. One such recognition is the relatively recent adoption of "In God We Trust" as our national motto. *Joint Resolution to establish a National Motto of the United States,* Ch. 795, Pub. L. No. 84-851, 70 Stat. 732 (1957). The phrase is evidenced upon all coins and currency, is in our National Anthem, and is inscribed over the entrance to the Senate Chamber. *Engel* v. *Vitale,* 370 U.S. at 440, 449. Since 1954, the Pledge of Allegiance has contained the words "One nation, *under God,* with liberty and justice for all." *Joint Resolution, etc.,* Pub. L. No. 94-344, § 1(19), 90 Stat. 810, 813 (1978), codified, as amended, at 36 U.S.C. § 172 (1978).

All of the institutions of our government are permeated with such practices, including this Court. The very decorum of this Court, as well as the ornamentation of the courtroom communicates this rich heritage. Since the days of John Marshall, this Court's crier has said, "God save the United States and this Honorable Court." *See* 1 C. Warren, *The Supreme Court in United States History* 496 (1922). Indeed, "[t]he very chamber in which oral arguments on this case were heard is decorated with a notable. . . symbol of religion: Moses with the Ten Commandments." *Lynch* v. *Donnelly,* 104 S.Ct. at 1361.

It is blinking at reality to say that the practices and actions described above do not provide concrete, specific

historical evidence upon which to evaluate the constitutional validity of the Alabama statute. In light of this rich heritage of governmental benevolence towards religion, the result is inevitable. As Justice William O. Douglas instructs: "We are a religious people whose institutions presuppose a Supreme Being." *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952). The invalidation of this statute would severely contradict our history, and bring this Court into "war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." *McCollum* v. *Board of Education*, 333 U.S. at 211-212; *Lynch* v. *Donnelly*, 104 S.Ct. at 1359.

II.

Alabama's Statutory Provision Which Permits Public School Teachers To Begin The School Day With Meditation Or Silent Prayer Merely Permits An Exercise Of The Liberty Of Conscience In Its Purest Form.

Liberty of conscience, or the freedom to believe according to the dictates of one's own conscience, is a primary philosophical tenet of both First Amendment Religion Clauses. *Wooley* v. *Maynard*, 430 U.S. 705, 714-715 (1976); *Stanley* v. *Georgia*, 394 U.S. 557, 565 (1969); *School District of Abington Township, Pa.* v. *Schempp*, 374 U.S. 203, 226 (1963); *Thomas* v. *Collins*, 323 U.S. 516, 530-531 (1944); *Prince* v. *Massachusetts*, 321 U.S. 158, 164-165 (1944); *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1942); *Jones* v. *Opelika*, 316 U.S. 584, 595 (1942) (Opinion of Reed, J.); *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940); *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1922). Concern for this liberty is central throughout all of the protections embodied in the Bill of Rights, particularly those identified by this

Court as constituting the right to privacy. It would do violence to both the letter and spirit of our Constitution to sever religious beliefs from the other freedoms of conscience that are now clearly protected in the public school environment.

In *Cantwell* v. *Connecticut*, 310 U.S. 296, the first instance wherein the Religion Clauses were made applicable against the states, this Court held that the First Amendment "embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." *Id.* at 383-384. The absolute restriction on governmental regulation of belief springs from the sentiment that "the rights of conscience are, in their nature, of peculiar delicacy, and will bear the gentlest touch of governmental hand." I *Annals of Cong.* 730 (J. Gales ed. 1834) (Statement of Rep. Daniel Carroll of Maryland during debate on August 15, 1789). *See also School District of Abington Township, Pa.* v. *Schempp*, 374 U.S. at 231 (Brennan, J., concurring).

The illimitable liberty of conscience embodied in the First Amendment, was, and still is, a point of scholarly unanimity. As Professor Giannella has written:

> The original constitutional consensus concerning religious liberty was an outgrowth of Protestant dissent and humanistic rationalism, the viewpoints that dominated the thinking of the authors of the Constitution. These two perspectives conjoined to place the individual conscience beyond the coercive power of the secular state. For the Protestant dissenter there was a Higher Power claiming his ultimate allegiance. For the rational humanist the individual was anterior to the state; in the social contract with the state he had properly reserved the right to his opinions and beliefs on matters on ultimate concern. This respect for the inviolability of conscience lies at the heart of the free exercise clause of the first amendment.

Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development—Part I*, 80 Harv. L. Rev. 1381, 1386 (1967).

Freedom to believe is not limited solely to the Free Exercise Clause. It is clear from the *Annals of Congress* that the Establishment Clause was sought primarily to protect the *individual* citizen from the predatory tendencies of a national ecclesiastical establishment in violation of his or her liberty of conscience. As this Court recently recognized in *Lynch* v. *Donnelly*, 104 S.Ct. at 1361, quoting from Justice Joseph Story:

> The real object of the First Amendment was . . . to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.

J. Story, *supra*, at 593-595. Justice Story went on to state that:

> [The First Amendment] thus cut off the means of religious persecution (the vice and pest of former ages), and of the subversion of the *rights of conscience* in matters of religion.

Id. (emphasis supplied). The principle of liberty of conscience also pervades Madison's *Memorial and Remonstrance Against Religious Assessments* and Jefferson's *Bill Establishing Religious Freedom*, and, indeed, was a central motivating factor in disestablishment, as well as religious liberty.

This freedom, *the right to believe*, also provides the foundation for numerous constitutional immunities. Such preferred freedoms as the free exercise of religion, speech, press, assembly, petition, security against search and seizures, and immunity from self-incrimination are all causally linked

with the liberty of conscience. *Thomas* v. *Collins*, 323 U.S. at 530-531). *Cf. Baird* v. *State Bar of Arizona*, 401 U.S. 1, 6 (1970); *Jones* v. *Opelika*, 316 U.S. at 595; *Bridges* v. *California*, 314 U.S. 252, 264-265 (1941). These freedoms all have their point of origin and their justification in freedom of thought. *Wooley* v. *Maynard*, 430 U.S. at 714. It is in this respect that the Alabama statute recognizes and advances free thought. This fact has been recognized by this Court:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. *They recognized the significance of man's spiritual nature*, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man. *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). *See Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965); *cf. NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958).

Stanley v. *Georgia*, 394 U.S. at 564 (emphasis supplied).

It is primarily the *religious nature* of the thoughts, reflections, mediations or prayers, that are objectionable to the appellees. An eradication of religious sentiment certainly does not promote true constitutional objectives. The Establishment Clause does not mandate a regime of absolute separation between religious aspirations and secular thought. Not only would this be impracticable, it would be impossible. As this Court has noted, thought and religion both "have unity in the character's prime place because they have unity in their human sources and functionings. Heart

and mind are not identical. Intuitive faith and reasoned judgment are not the same. Spirit is not always thought. But in the everyday business of living, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways. They cannot be altogether parted in law more than life." *Prince* v. *Massachusetts*, 321 U.S. at 164-165. It would be inapropos to so fervently protect the liberties of speech, press, assembly, and petition in the school forum, while curtailing that freedom of conscience which is their root and origin. *Cf. Tinker* v. *Des Moines Independent School District*, 393 U.S. 503, 511 (1968).

Content-based censorship of thoughts, solely because the meditation may be of religious significance does "violate both the letter and the spirit of the Constitution." *Id.* at 512. "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley* v. *Georgia*, 394 U.S., at 565. Unquestionably, "the classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' " *Tinker* v. *Des Moines Independent School District*, 393 U.S. at 512; *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967); *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960). This liberty is closely linked to the right to receive information, which is protected under the First Amendment. *Martin* v. *City of Struthers*, 319 U.S. 141, 143 (1943); *Winters* v. *New York*, 333 U.S. 507, 510 (1948); *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965); *Lamont* v. *Postmaster General*, 381 U.S. 301, 307-308 (1965) (Brennan, J., concurring); *Stanley* v. *Georgia*, 394 U.S. 557. Religious belief and speech should receive no less protection.

III.

Alabama's Statutory Provision Allowing Meditation Or Silent Prayer Is An Example Of Affirmatively Mandated Accommodation.

First Amendment neutrality *mandates* that the public school present no affront to the spiritual needs and concerns of its students. Voiding the Alabama statute would have two "chilling effects" on the First Amendment rights of students. First, it would prefer those who believe in no religion over those who believe. Second, it would subjugate the Free Exercise Clause to Establishment Clause interests,[6] thus, contradicting the original intention of the Framers of the First Amendment.

It is obvious that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach* v. *Clauson,* 343 U.S. at 313, and that those actions which are "simply a tolerable acknowledgement of beliefs widely held among the people of this country," are not *per se* an establishment of religion. *Marsh* v. *Chambers,* 103 S.Ct. at 3336. It is equally clear that the "limits of permissible state accommodation are by no means co-extensive with the noninterference mandate by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself. *See Sherbert* v. *Verner,* 374 U.S. 398, 423 (1963) (Harlan, J. dissenting); *Braunfeld* v. *Brown,* 366 U.S. 599, 608 (1961)." *Walz* v. *Tax Commission,*

[6] As Paul Kauper has written: "If the protection afforded in the name of religious freedom against a state-prescribed, non-theistic orthodoxy is that a person cannot be compelled to participate, whereas the protection afforded in the name of the establishment clause is that a person may demand that any exercise promoting theistic belief be completely eliminated, the result is that the freedom protected by the establishment clause is regarded as having a higher value than the freedom protected by the free exercise clause." Kauper, *Prayer, Public Schools and the Supreme Court,* 61 Mich.L.Rev. 1030, 1063 (1962).

397 U.S. at 673. "There is room for play in the joints productive of benevolent neutrality" towards religion. *Id.* at 669. This benevolence is mandated in the present case.

Governmental intrusion into the area of religion in contemporary society involves comparative religion, philosophy, ethics, and values clarification courses. As Giannella notes:

> Unlike . . . other areas, formal public education does not involve a pattern of regulation in which the place of religion can be derived from secular catagories . . . education directly touches upon religious concerns, such as the meaning of existence and the sources and nature of human values.

Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development—Part II, 81 Harv.L.Rev.* 513, 561 (1968).

Because of this entrance into the precinct of religion, it is constitutionally impermissible for government fanatically to seal religion from the classroom. Such a secularization would prefer nonbelief over belief. *Zorach* v. *Clauson,* 343 U.S. at 314. Moreover, the Constitution does not require "complete separation of church and state; it *affirmatively mandates accommodation,* not merely toleration, of all religions, and forbids hostility towards any." *Lynch* v. *Donnelly,* 104 S.Ct. at 1359 (emphasis supplied).

The requirement of affirmatively mandated accommodation is particularly relevant in education due to the impressionable nature of the youths involved. Just as religious indoctrination may convey—indeed inculcate—doctrines contrary to the views of the children's parents, here the placing of the governmental hand upon the shoulder of a young religious adherent for holding and expressing those views would be equally inappropriate. In the past, this

Court has sought to "sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows in the best of our traditions. . . . The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. . . . But it can close its doors or suspend its operations as to these who wish to repair to their sanctuary for worship and instruction. No more than that is undertaken here." *Zorach* v. *Clauson*, 343 U.S. at 313-314.

The school room is undoubtedly a "market place of ideas." This is the goal of the pluralism we profess. Alabama's solution, the accommodation of all creeds, while espousing none, cannot help but to further the true spirit of voluntarism, pluralism, and religious liberty. In this Republic, where large degrees of personal autonomy from governmental restraints are normative and limitations upon preferred freedoms are the exception, it is inappropriate "to impose a crabbed reading of the [religion] clauses on the country." *Lynch* v. *Donnelly*, 104 S.Ct. at 1366.

IV.

Alabama's Statutory Provision Allowing Meditation Or Silent Prayer Does Not Violate The Lemon Tripartite Test.

A. Alabama Code § 16-1-20.1 Serves Secular Educational Purposes.

In the past, this Court has found it useful to inquire 1) whether a challenged law or conduct has a secular purpose, 2) whether its principal or primary effect is to advance or inhibit religion, and 3) whether it creates an excessive en-

tanglement of government with religion. *Lemon* v. *Kurtzman*, 403 U.S. at 612-613. However, as this Court has recently noted, even where applicable, this "tripartite test" provides "no more than a helpful 'signpost' in dealing with Establishment Clause challenges." *Lynch* v. *Donnelly*, 104 S.Ct. at 1367 (O'Connor, J., concurring); *Mueller* v. *Allen*, 463 U.S. ____, ____, 103 S.Ct. 3062, 3066 (1983); *Hunt* v. *McNair*, 413 U.S. 734, 741 (1973).[7]

The first of those criterion, that the legislation or conduct have a *secular purpose*, is easily met. Undoubtedly "the definition of 'secular' here must be a generous one . . . [otherwise] . . . virtually nothing that government does would be acceptable; laws against murder for example, would be forbidden because they overlapped the fifth commandment of the Mosaic Decalogue." L. Tribe, *American Constitutional Law* 835 (1978).

Prayer is a patently religious activity. Meditation may or may not be. Used in its ordinary sense, "meditation" connotes reflection or contemplation on a subject which may be religious, irreligious, or non-religious. Because of its unique nature, a moment of silence for "meditation or prayer" permits the religious, irreligious, or non-religious content of that moment to be determined by the individual student. To a believer, it is a reasonable accommodation of religious belief. For an unbeliever, it is a moment to

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[7] In two recent cases, *Larson* v. *Valente*, 456 U.S. 228 (1982), and *Marsh* v. *Chambers*, 103 S.Ct. at 3330, this Court did not apply the *Lemon* "tests". More recently, *Lynch* v. *Donnelly* paralleled *Marsh* by closely analyzing the language, intent and history surrounding the Religion Clauses. Thus, under the rubric of both *Marsh* and *Lynch*, the *Lemon* analysis has been recognized to have a declining utility where unequivocable historical evidence mandates contrary results. In light of the volume of historical evidence available here, the *Marsh* rationale would be singularly appropriate to disposition of the present case without reference to the *Lemon* tests.

contemplate anything that he desires. Thus, the words... [meditation or silent prayer]...are capable of a reasonable construction by which the constitutional difficulties raised by the plaintiffs may be avoided. *See, e.g., Curtis* v. *Loether,* 415 U.S. 189, 192, n.6 (1974)." *Gaines* v. *Anderson,* 421 F.Supp. 337, 342 (D. Mass. 1976).

Plainly, those who do not wish to pray are free to contemplate anything they want. *Reed* v. *Van Hoven,* 237 F.Supp. 48, 56 (W. D. Mich. 1965). Because of this, there is no element of peer-pressure:

> If a student's beliefs preclude prayer in the setting of a minute of silence in a schoolroom, he may turn his mind silently toward a secular topic, or simply remain silent, without violating the statute . . . or facing the scorn or reproof of his classmates.

Gaines v. *Anderson,* 421 F.Supp at 345. *Accord,* Choper, *Religion in the Public Schools: A Proposed Constitutional Standard,* 47 Minn.L.Rev. 329, 371 (1963). Thus, the *content* of the "meditation or prayer" *may be* wholly secular, or wholly religious, depending on the individual's exercise of conscience.

An important secular interest furthered by this legislation is that of recognizing religious liberty. It is inconsistent to insist that the concept behind the Free Exercise Clause has a necessarily religious purpose. If it does, then the *Lemon* test is fatally flawed. It is obvious that the establishment of the freedom to believe or not to believe is not an establishment of religion. If this were not so, the Free Exercise Clause and the Establishment Clause would be incompatible. Such self-invalidation is a constitutional abhorrence. A moment of silence for meditation or silent prayer is a reasonable accommodation of the spiritual or non-spiritual needs of students which avoids such anom-

alies. *See, e.g.*, Note, *Religion and the Public Schools*, 20 Vand.L.Rev. 1078, 1092-93 (1967); P. Freund, *Religion and the Public Schools*, 23 (1965); Kauper, *supra;* Comment, *Accommodating Religion in the Public Schools*, 59 Neb.L.Rev. 425, 450-462 (1980).

Several other secular educational functions are more obvious. As this Court noted over two decades ago: "A quiet moment at the beginning of the day would tend to 'still the tumult of the playground and start a day of study.' " *School District of Abington Township, Pa.* v. *Schempp*, 374 U.S. at 281 and n. 57 (1963) (Brennan, J., concurring). Furthermore, the legislature could reasonably believe that students tend to learn greater self-discipline and respect for the authority of a teacher from a required moment of silence. *Gaines* v. *Anderson*, 421 F.Supp. at 342. Surely, it is consistent with the public schools secular educational goals to encourage students to turn silently towards serious thoughts and values. *Id.* at 343.

Another secular purpose also exists. It is that purpose which is analogous to "those governmental acknowledgements of religion [which] serve, in the only ways reasonably possible in our culture, the legitimate secular purpose of solemnizing public occasions, expressing confidence in the future, and encouraging recognition of what is worthy of appreciation in society." *Lynch* v. *Donnelly*, 104 S.Ct. at 1369 (O'Connor, J., concurring). *Accord, School District of Abington Township, Pa.* v. *Schempp*, 374 U.S. 203. Such a recognition of our religious-cultural heritage is clearly a legitimate educational goal.

B. Any Advancement Of Religion By A Moment Of Silence Is Merely *De Minimus* And Incidental.

A moment of silence provides no opportunity for inculcation or indoctrination. The entire exercise is *content*

neutral and *uniquely voluntary*. It does not have the primary effect of advancing a state religion, or religion in general. It is neutral as between belief and non-belief. It coerces no one. Providing a forum for an exchange of ideas or silence "does not confer any imprimatur of state approval on religious sects or practices."[8] *Widmar* v. *Vincent*, 454 U.S. 263, 274 (1981). It fosters religious freedom. As Justice Brennan has noted: "It has not been shown that...the observance of a moment of silence at the opening of class, may not adequately serve...solely secular purposes... without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government." *School District of Abington Township, Pa.* v. *Schempp*, 374 U.S. at 281. Any reverent attitude which would prevail during the silent period would be merely incidental to the secular purpose of the quieting of the students. Note, *Supra*, 20 Vand. L.Rev. 1078 (1967).

C. There Is No Entanglement Issue Presented Here.

The entanglement prong of the *Lemon* "test" is inappropriate here. The entanglement "test" was uniquely adopted in the instances where administrative entanglements or political divisiveness arise. *Lynch* v. *Donnelly*, VJD *S.Ct.* at 1364-1365. Because there are no such entanglements in this case, it is inappropriate to use it in this analysis. In addi-

[8] The imprimatur of state approval or disapproval is particularly relevant in this case because of certain *findings of fact* made at the trial court level. In the companion case, *Jaffree* v. *Board of School Commissioners of Mobile County*, 554 F. Supp. 1104 (S.D. Ala. 1983), specific *findings of fact* were made that a state religion was being established in Alabama schools. The trial court found that a "religion of secularism"—secular humanism—was being promoted through the organs of the state. *See Id.* at 1129-1130, n. 41. *Cf. Torcaso* v. *Watkins*, 367 U.S. 488, 495, n. 11 (1961). Clearly such indoctrination is improper.

tion, it should be noted that a unique barrier stands between the state and religion in this instance—*silence*. In a very real way, the individual religious adherent is insulated by silence from intrusion. Entanglements are impossible because of the nature of this exercise.

CONCLUSION

Clearly, "[t]he purpose of the establishment clause was not to extirpate religion from public life." Comment, *Secularism in the Law: The Religion of Secular Humanism*, 8 Ohio N.U.L.Rev. 329 (1981). The mind frame of those who directed the constitutional era and the drive toward separation of church and state "was, in some respects, anticlerical, as a result of Papism, Cromwellism, etc., but never antireligious, so that some interrelating and intermeshing of state and religion have always been with us." Forkosch, *Religion, Education, and the Constitution—A Middle Way*, 23 Loyola L.Rev. 617 632 (1977).

The Framers sought to avoid the kind of hostility found in this case by accommodating the religious interests of the people. There was no intention on the part of the Framers to censor or eradicate religion from education. And such has never occurred. The rule of separation that the Framers had in mind when they drafted the First Amendment was to be implemented in a climate of accommodation and benevolence, not of hostility toward religion.

Appellees reasoning runs contrary to this central historical and political truth. Such reasoning amounts to a *de facto* establishment of what this Court has previously identified as a "religion of secularism," *School District of Abington Township* v. *Schempp*, 374 U.S. at 225, which seeks fervently to eradicate all mention of religion from public life. *See also Giannella, supra*, 81 Harv.L.Rev. at

586-587 and *Torcaso* v. *Watkins*, 376 U.S. at 495, n. 11. As Harvard professor Harvey Cox has noted, secularism is an "ideology, a new closed world view which functions very much like a new religion. . . . It is a closed ism." H. Cox, *The Secular City* 18 (1965). "It is a menace to freedom because it seeks to impose its ideology through the organs of the State." *Id.*

Here, the State of Alabama did nothing more than accommodate in neutral fashion the cultural-historical-religious elements of America's past and present. As Kauper has noted, by way of such accommodation governments are "contributing to religious freedom and making it more meaningful." P. Kauper, *Civil Liberties and the Constitution* 10 (1962).

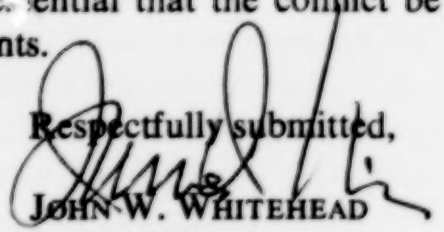
When the people of Alabama ratified their Constitution, they echoed the religious beliefs of the Framers of the Federal Constitution. In their preamble they proclaimed:

> We, the people of the State of Alabama, in order to establish justice, insure domestic tranquility, and secure the blessings of liberty to ourselves and our posterity, invoking the favor and guidance of Almighty God, do ordain and establish the following Constitution and form of government for the State of Alabama.

Ala. Const. of 1901, Preamble, Ala. Code, Vol. 1. In ratifying the Bill of Rights, their descendants never imagined that one day the United States Constitution could be argued in such a manner as to limit the display of the faith they proclaimed, much less prohibit a moment of silence in their public schools.

It is, therefore, essential that the conflict be resolved in favor of the appellants.

Respectfully submitted,



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